AUG 1 1969
JOHN F. DAVIS, CLERK

Supreme Court of the United States

No. 418

TYRONE, INC., A VIRGINIA CORPORATION, TRADING AS LEE ART THEATRE, AND HOWARD WILLIAM BURTNETT,
Petitioners,

v.

JAMES B. WILKINSON, COMMONWEALTH'S ATTORNEY FOR THE CITY OF RICHMOND, VIRGINIA, AND FRANK S. DULING, CHIEF OF POLICE FOR THE CITY OF RICHMOND, VIRGINIA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioners respectfully ask this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, which affirmed the judgment of the United States District Court for the Eastern District of Virginia, with the exception that the relief obtained by the petitioners was further restricted.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Virginia is reported in 294 F. Supp. 1330. The opinion of the Court of Appeals for the Fourth Circuit has not yet been officially reported. Both opinions are annexed hereto as an Appendix (Appendix 1a-24a, *infra*).

JURISDICTION

The judgment of the Court of Appeals was entered on May 6, 1969 (Appendix 12a). The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. Does the seizure of motion picture films in violation of the First Amendment, together with the other facts of this case, entitle the petitioners to equitable relief from state court prosecution based on said seizures?

II. Did the United States Court of Appeals for the Fourth Circuit err when it imposed on petitioners the requirements of making available to the State copies of illegally seized films for use in the state court prosecution against the petitioners?

STATUTES INVOLVED

Title 42, United States Code: § 1983

> "Every person who, under color of any statute, ordinance, regulation, custody, or usage, of any state or territory, subjects or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in action at law, suit in equity, or other proper proceeding for redress."

Title 28, United States Code: § 2283

> "A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

STATEMENT

On the night of October 21, 1968, the motion picture film, "Angelique in Black Leather," and the previews of another film, "Of the Same Gender," were seized by Richmond police officers acting at the direction of the defendants, the Commonwealth's Attorney and the Chief of Police for the City of Richmond, Virginia. Prior to the seizure, which occurred during the business hours of the petitioners' theatre, the police officers had obtained a search warrant which had commanded them to enter the theatre operated by the petitioners at 934 West Grace Street, Richmond, Virginia, and there seize the said "obscene films."

Prior to the interruption of the petitioners' business operations by the seizure on the evening of October 21, 1968, there had been no adversary determination of the obscenity of the films and prints in question. No adversary hearing on the question of alleged obscenity had been afforded the owner of the film, or the exhibitor, Tyrone, Inc., or its theatre manager, the petitioner, Burtnett. The seizures were without the consent of the petitioners and without any notice to them in advance.

Following seizure of the films, Criminal Informations were returned in the state court charging the petitioner, Tyrone, Inc., with the possession and exhibition of a lewd and obscene motion picture and charging Howard William Burtnett with managing a theatre where an obscene motion

picture was shown and displayed to the public. The criminal cases against the petitioners are now pending and awaiting trial in the Hustings Court of the City of Richmond. The films and prints in question have remained in the possession of the defendants.

The petitioners initiated this case by bringing an action under 42 U.S.C. sec. 1983, the Civil Rights Act, alleging a violation of their rights under the First, Fourth, and Fourteenth Amendments and praying for equitable relief from the seizures. The petitioners seek an injunction against the pending and any future prosecutions on obscenity charges, where seizures of motion picture films are made without a prior adversary hearing on the question of obscenity. The thrust of the complaint was that the seizures materially and adversely affected the Constitutional rights of the petitioners by inhibiting dissemination of presumably protected motion pictures that had not been declared to be obscene or in violation of any law. It was alleged that the seizures and the threats of seizures amounted to repression of protected freedoms, and that the facts of the case demonstrated irreparable damage and injury.

The evidence in support of the petitioners' case in the District Court established an unequivocal pattern of past conduct on the part of law enforcement officials in the City of Richmond. There had been three prior raids on the theatre resulting in the seizures of films. The first raid occurred in March, 1966, which resulted in a conviction which was overturned later by the United States Supreme Court in *Lee Art Theatre, Inc.* v. *Virginia,* 392 U.S. 636 (1968). The second raid occurred in August, 1966, and resulted in a conviction which was not appealed. In October, 1966, another raid and seizure resulted in a conviction which is now on appeal in the Supreme Court of Appeals of

Virginia. In each case police officers raided the petitioners' theatre after securing search warrants and after consultation with the defendant, Wilkinson. One of these occasions, October 26, 1966, two 35 millimeter movie projectors were seized. On the same occasion police officers damaged machinery and equipment belonging to the corporate petitioner, including the cutting of cables and the electrical wiring to the motion picture projectors, thereby forcing the corporate petitioner to spend in excess of $1,500.00 for repairs. This damage was unrelated to any legitimate state purpose.

The defendant, Mr. Wilkinson, testified in the District Court. He admitted that the seizures of all films in 1966 and in 1968 were accomplished in the absence of a prior adversary hearing on the question of obscenity. He defended the seizure of the projectors on the theory that they were instrumentalities used in the commission of a crime. He stated that the seizures would be repeated in the future, and that he did not intend to afford a prior adversary hearing until he was ordered to do so by some authority of competent jurisdiction. He stated that he was familiar with the decision of the United States Supreme Court in *A Quantity of Books* v. *Kansas*, 378 U.S. 205, at the time of all the aforesaid seizures, but stated that he did not feel bound by that decision.

The United States District Court for the Eastern District of Virginia in 294 F. Supp. 1330 ordered a return of all motion picture films seized by the defendants and permanently enjoined the defendants from seizing allegedly obscene motion picture films without first affording petitioners a prior adversary hearing. The District Court refused to enjoin the pending criminal prosecutions on obscenity charges in the state court. (Appendix 1a)

The United States Court of Appeals for the Fourth Circuit affirmed the District Court, in an opinion which is not officially reported yet, except that it imposed on the theatre the obligation to make copies of the films available for the preparation and trial of the criminal cases (Appendix 12a)

REASONS FOR GRANTING THE WRIT

The seizures of the films in question and the related criminal prosecutions, having been commenced without first affording the petitioners a prior adversary hearing on the question of obscenity, are in clear violation of the Constitution. *A Quantity of Books* v. *Kansas,* 378 U.S. 205 (1965) the leading case on the Constitutional requirement of an adversary hearing prior to seizure, has been followed universally by the federal courts. See *Freedman* v. *Maryland,* 380 U.S. 51, 132 Ed. 2d 649; *Metzger* v. *Pearcy,* 393 F.2d 202; *United States* v. *18 Packages of Magazines,* 238 F. Supp. 846; *Cambist Films* v. *Illinois,* 292 F. Supp. 185; *United States* v. *Brown,* 274 F.Supp. 561.

The purpose of the procedural requirement of an adversary hearing is to safeguard against governmental suppression of expression. Despite the acknowledged necessity for caution in the area of First Amendment freedoms, the defendants in this case brazenly ignore the rule requiring an adversary hearing prior to seizure and publicly announce their intention to continue to ignore the rule.

On these facts the District Court found that there was no bad faith enforcement of the Virginia obscenity statutes on the part of law enforcement officials (Appendix 10a). It is submitted that the test of what constitutes bad faith enforcement of state law must be an objective one. More than the sincerity of the Commonwealth's Attorney is involved when he says that he does not feel bound by the decisions

of this Court. The application of an objective principle of law should not depend on a subjective state of mind. The prosecutor's motives are far less important than what the objective facts reveal. Those facts show an unequivocal course of conduct by the defendants in raiding the theater's premises and seizing its films. The seizure of motion picture projectors and the wilful damage to the property belonging to the theater, admitted acts in this case, and wholly unrelated to any legitimate purpose the State may have in its prosecution, prove the petitioners' claim of bad faith enforcement.

In *Dombrowski* v. *Pfister,* 380 U.S. 479 (1967) this Court held that bad faith enforcement of state law constituted a ground for federal equitable relief from state court criminal proceedings. We recognize that *Dombrowski* also involved the unconstitutionality of broad statutes regulating freedom of expression, but the holding of *Dombrowski* is that either bad faith enforcement of state law or the unconstitutionality of statutes regulating freedom of expression justifies federal injunctive relief from state criminal prosecution.

The following language from the opinion of the Court in *Dombrowski* is relevant.

> "We hold that abstention doctrine is inappropriate for cases such as the present one where, unlike *Douglas* v. *City of Jeannette,* statutes are justifiably attacked on their face as abridging free expression *or as applied for the purpose of discouraging protected activities.* 380 U.S. 489-490, 85 S.Ct. 1122 (Emphasis added).

The use of the disjunctive phrase clearly indicates that the two exceptions were recognized by the Court.

Later decisions of this Court and lower federal courts have recognized that bad faith enforcement of state statutes

is an independent ground for federal equitable relief from state court prosecutions. *Cameron* v. *Johnson,* 381 U.S. 747 (1967); *Cameron* v. *Johnson,* 390 U.S. 611 (1968); *Carmichael* v. *Allen,* 267 F.Supp. 985 (N.D. Gov. 1967); *Ware* v. *Nuchols,* 266 F.Supp. 564 (N.D. Miss. 1967); *Cambist Films* v. *Illinois,* 292 F.Supp. 185 (N.D. Ill. 1968); *Landry* v. *Daley,* 288 F.Supp. 200 (N.D. Ill. 1968).

It is obvious that the *Dombrowski* decision rests on the unstated assumption that in a free and democratic society the full exercise of First Amendment freedoms should not be substantially impaired but should be actively encouraged. The "chill" on expression resulting from bad faith prosecution or prosecution undertaken in violation of the First Amendment involves more harm or injury than "that incidental to every criminal proceeding brought lawfully and in good faith." As this Court has stated "free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser."

It is clear that the prosecution in the case at bar has been undertaken in violation of the First Amendment. If this is true because the procedures render unconstitutional the application of state law to the petitioners, then the conduct depicted amounts to the necessary "special circumstances" for full and complete equitable relief from the pending state court prosecutions. This is indeed the rationale of the *Dombrowski* and the *Cameron* decisions that has been reached by this Court without consideration of the applicability of the anti-injunction statute, 28 U.S.C. § 2283. Thus, this Court has sanctioned full equitable relief without formal discussion of § 2283. The petitioners therefore submit that on the basis of existing case law they are entitled to full equitable relief, including a stay of the pending state court prosecutions.

There is a conflict among the Circuits as to whether or not the Civil Rights Act, 42 U.S.C. § 1983 creates any exception to the general prohibition of § 2283 of the Judiciary Act. The Court of Appeals for the Third Circuit, in *Cooper* v. *Hutchinson,* 184 F.2d 119, held that § 1983 constituted an express authorization for the granting of an injunction against state court proceedings within the meaning of § 2283. See also *Tribune Review Publishing Co.* v. *Thomas,* 153 F.Supp. 486 (W.D. Pa. 1957); *Hullett* v. *Julian,* 250 F.Supp. 208 (M.D. Ala. 1966). On the contrary, *Goss* v. *Illinois,* 312 F.2d 257 (7th Cir. 1963); *Sexton* v. *Barry,* 233 F.2d 220 (6th Cir. 1956) and *Baines* v. *City of Danville,* 337 F.2d 579 (4th Cir. 1964) hold that the Civil Rights Act does not create an express exception to the anti-injunction statute. Clearly, the Courts of Appeals are in conflict on the same issue and an important question of federal law should be settled by this Court.

The exhaustive opinion in *Landry* v. *Daley, supra* (1968) contains a cogent analysis of the issue, including an attack on the Fourth Circuit opinion in *Baines* v. *City of Danville, supra.* The historical background of the anti-injunction statute is traced back to the Congress of 1793. The Civil Rights Act is traced to the judgment of a Reconstruction Congress. The following language appears at page 223 of the opinion in *Landry* v. *Daley.*

> "Thus, when the anti-injunction statute and the Civil Rights Act are viewed in their historical posture, their relationship becomes clearer. Section 1983, a product of a later Congress and an expression of an overwhelming Congressional concern for the protection of federal rights from desecration by state action would seem to have been intended to be an exception to the general limitation of § 2283.

> "Moreover, § 2283 is not a jurisdictional statute. In spite of its absolute language, it does not prevent a federal court from enjoining state court proceedings where special circumstances justify such relief. It is essentially a statutory adoption of the doctrine of comity and its demand is directed to the discretion of the federal court."

The Court stated that the *Dombrowski* and *Cameron* decisions cast doubt on the reasoning and the conclusion of the Fourth Circuit in *Baines*. It stated that the considerations which this Court recognized in *Dombrowski* as requiring full equitable relief where individuals or groups are being prosecuted for improper reasons unrelated to any valid state purpose or without probable cause in violation of their constitutionally protected freedoms, support the conclusion that § 2283 is inapplicable under such circumstances. This is said at page 224 of *Landry* v. *Daley*:

> "The alternative view that § 2283 bars a prayer for injunctive relief of all pending prosecution would severely limit the effective scope of § 1983. The scope of the remedy would then depend on the mere fortuity that the person affected by such harrassment had instituted a suit in the federal court before formal charges were brought against him in the state courts.
>
> * * *
>
> "Moreover, while the Supreme Court has never specifically passed on the point, the clear inference of its decisions and orders in *Dombrowski* and the first *Cameron* case is that § 2283 is not an absolute bar to injunctive relief in a § 1983 case where such a remedy is the only means of securing constitutionally protected rights. Inferentially at least, these decisions would appear inconsistent with the earlier Fourth and Seventh Circuit decisions holding § 2283 a bar and consistent with the contrary decision of the Third Circuit."

That such complete relief from the prior suppression of constitutionally protected material is the only means of securing to the petitioners their full First Amendment rights should be clear from the record of this case. It is the combination of illegal seizures in the past together with the announced intention of the authorities to disregard a requirement of substantive law under the First Amendment that make this record clear. It is not possible to reconcile the prosecution's position with good faith enforcement of the law.

Finally, the opinion of the Circuit Court below imposed upon the petitioners the requirement that they deliver to the Commonwealth Attorney, upon his request, a copy of the illegally seized movie for the latter's use in preparation and trial of the cases pending in the state court. See Appendix 24a. This requirement was imposed notwithstanding the holding that the seizures were illegal and unconstitutional. Proper motions for return of the illegally seized films were made. The District Court ordered the films returned. See Appendix 10a. It is respectfully submitted that the First Amendment is of no lesser dignity than the Fourth Amendment. If illegally seized evidence under the Fourth Amendment must be returned, why should illegally seized material under the First Amendent stand on lesser footing?

It is respectfully submitted that if copies of illegally seized films must be made available to the prosecution, the relief to which the petitioners are entitled is thereby made illusory and the prosecution, by retaining the fruits of an illegal and unconstitutional seizure, has been told that it can profit by conduct which is in violation of the First Amendment.

Since the seizure of the film "Angelique" in this case was accomplished without a prior adversary hearing on the question of its obscenity and was in flagrant disregard of petitioners' rights under the First Amendment, the petitioners respectfully submit that they are entitled to full equitable relief, including a stay of the pending state court prosecutions against them. Further, the Circuit Court's requirement that the petitioners make available to the prosecution copies of films illegally seized from them compels a consideration of this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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July, 1969

APPENDIX

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA RICHMOND DIVISION

Memorandum

MERHIGE, District Judge.

This is an action brought by plaintiffs seeking injunctive relief from the seizure of motion pictures and from criminal prosecutions based on the alleged offense of obscenity.

The Court having considered the pleadings, exhibits and statements of counsel, and the evidence of witnesses, finds as follows:

Jurisdiction of the Court is invoked under Title 42 United States Code Section 1983.

Plaintiff is a corporation operating a movie theater in the City of Richmond, within this district; the indivdual plantiff is a resident of Richmond, Virginia, and was manager of the movie theater on October 21, 1968; the defendant, Wilkinson, is the prosecuting attorney for the City of Richmond, Virginia; and the defendant, Duling, is the Chief of Police for the said city.

On or about March 21, 1966, with the acquiescence of the defendant, Wilkinson, members of the Police Department, one of whom had not attended a movie theater for some five to ten years prior thereto, commenced a series of raids on the Lee Art Theater, operated by the corporate plaintiff. In each instance the modus operandi would be for one or more police officers to view the films, prepare affidavits after consultation with the Commonwealth's Attorney, and secure a search warrant. In at least three instances in 1966 this procedure was followed, search warrants secured, and the officers seized certain films being shown by the corporate plaintiffs. The plaintiffs were prosecuted and found guilty in all three instances of having "exhibited in public a lewd and obscene motion picture." In one case

the United States Supreme Court reversed the conviction; in a second, the Supreme Court of Appeals of Virginia has issued a writ of error and will hear the matter; and in the third, a judgment of guilt became final without any appeal.

As a result of one of the raids, the corporate petitioner was forced to expend a sum in excess of $1,500.00 to install temporary projection machinery and to repair and re-install original equipment which the police officers had seized as having been used for the commission of a crime.

It is uncontradicted that the seizure of all of the films was accomplished without any prior adversary hearing on the question of obscenity. This by reason of the defendant, Wilkinson's view that the law doesn't require an adversary hearing prior to the seizure of the films in question. The Commonwealth's Attorney very frankly states to the Court that he does not intend to afford a prior adversary hearing in the event search warrants are secured for films which may be shown in the future unless and until, as he put it, he is satisfied that he is required to do so under the law.

As a result of a viewing of a film being shown by the plaintiff corporation, affidavits were filed by certain police officers and other parties affirming that each affiant "had witnessed a movie at Lee Art Theater, 934 West Grace Street, and found it to be obscene without redeeming social value and it goes substantially beyond community standards in the display of nudity and sex and the dominant theme or purpose appeals to the prurient interest," and upon their application a search warrant was issued, the theater raided, and the allegedly obscene films confiscated and delivered to the City Sergeant for the City of Richmond. There was admittedly no adversary hearing prior to either the issuance of a search warrant or the seizure of the films. It should be noted that the magistrate who issued the search

warrant likewise viewed the film prior to the issuance of said warrant.

Subsequent to said seizure, criminal informations were filed at the instance of the Commonwealth's Attorney, Wilkinson, charging the corporation and the plaintiff, Burtnett, with having unlawfully possessed, shown and exhibited in public a lewd and obscene motion picture in violation of the laws of Virginia. It would appear that the plaintiffs are charged with having violated the statutory laws of Virginia in reference to obscenity. See Title 18.1-227, etc., Code of Virginia 1960.

The plaintiffs ask this Court for equitable relief directing that the defendants return the prints of the motion picture films seized as aforesaid, and ask the Court to restrain the defendants, and all persons in concert with them, from seizing any prints of movie films, or otherwise interfering with the exhibition of any films exhibited by plaintiffs, prior to a determination of obscenity in an adversary proceeding. In addition, plaintiffs ask the Court to restrain the defendants from the further prosecution of the plaintiffs pursuant to the criminal informations filed by the defendant, Wilkinson, in the Hustings Court of the City of Richmond.

Defendants have moved the Court to dismiss the complaint and in argument before the Court, in essence denied that they are bound by certain opinions of the Supreme Court of the United States.

The facts are generally undisputed. It should be borne in mind that questions of abstention and of injunctive relief are not the same. See *Dombrowski* v. *Pfister*, 380 U.S. 479, 483, at 489, 85 S.Ct. 1116, 14 L.Ed.2d 22. Wherever federal courts sit, rights under the Federal Constitution are always a proper subject for adjudication. See *Zwickler* v. *Koota*, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967).

The plaintiffs in the instant case allege a violation of Constitutional rights. The real issue is whether the procedures employed by the defendants are Constitutionally insufficient by their admitted failure to take appropriate steps to adequately safeguard against the suppression of non-obscene movie films. There can be no doubt but that it has certainly, since 1951, been settled that motion pictures are within the ambit of protection which the First Amendment, through the Fourteenth, secure to any form of "speech" or "the press." The establishment of the Congressional guarantees of freedom of speech and press have, since the case of *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098, has been consistently followed. (Note: *Kingsley International Pictures Corp.* v. *Regents of University of State of New York,* 360 U.S. 684, 79 S.Ct. 1362, 3 L.Ed.2d 1512 (1959); *Jacobellis* v. *State of Ohio,* 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964); *Metzger* v. *Pearcy,* 393 F.2d 202 (7 Cir. 1968).)

It should be noted that the Virginia law provides a method which, although not required by Virginia law, may be employed in order to afford an adversary hearing in proceedings against movie films alleged to be obscene. See 18.1-236.3 Va. Code 1960 and 1968 supplement 18.1-236.4.

The Court does not find it necessary to pass upon the Constitutionality of any Virginia statute, nor must this Court pass upon the alleged obscenity of the movie films in question.

Defendant, Wilkinson, has testified that he did not employ the procedures afforded under the Virginia statute aforementioned prior to acquiescing in the seizure on the grounds that he did not think it fair to subject one to a civil proceeding and then perhaps to subsequently prosecute.

It is difficult for this Court to recognize the logic of subjecting a person first to a criminal prosecution, with the attendant notoriety, by reason of a desire not to put one to the difficulty of a civil proceeding. There is no doubt in this Court's mind but that the seizure of the films in the instant case, and the manner in which it was done, falls short of due process. An informal gathering of police officers, prosecuting authorities, and a magistrate who issued a search warrant, by reason of their having purchased admission tickets to a theater and having viewed the film in question, does not amount to due process.

In order to properly protect the freedoms afforded by the First Amendment to the Constitution of the United States, there must be conformity to procedures that insure against the curtailment of Constitutionally protected expression which, as stated in the case *A Quantity of Books* v. *Kansas,* 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809, "is often separated from obscenity only by a dim and uncertain line."

The object of an adversary hearing is to insure that expression will not be suppressed without contest and justification. An adversary proceeding contemplates an opportunity for one to be afforded the protection of the First Amendment to the Constitution of the United States. Allegedly obscene publications or movies are not to be treated the same way as narcotics, gambling paraphernalia and other contraband. The legal rules governing the former are different from the latter. *Metzger* v. *Pearcy, supra.*

The defendants' argument that they are not bound by the decision of the *A Quantity of Books* v. *Kansas* holding of the United States Supreme Court, coupled with the defendant, Wilkinson's announced intention to continue the authorizing of the seizure of allegedly obscene motion pictures without affording the possessors and exhibitors

of same a prior adversary hearing to determine if same are obscene, leaves the Court no alternative except to issue an appropriate injunction.

The freedom of press and expression, whether it be through newspapers or motion pictures, is too precious a freedom to permit the risk of suppression of non-obscene material simply because a law enforcement officer announces an intention not to afford a prior adversary hearing unless directed to do so by a Court, or his present interpretation of the law changes.

An appopriate order directing the defendants to cause to be returned the picture film seized on October 21, 1968, will be entered, and defendants and all acting in concert with them will be enjoined from seizing allegedly obscene motion pictures without affording a prior adversary hearing to the possessors and exhibitors of same. The Court finds no valid reason why it should not refrain from granting equitable relief from the criminal prosecution now pending; if plaintiffs did in fact possess and exhibit obscene motion picture films in violation of law a prosecution of same is entirely appropriate. The instant case differs from the case of *Dombrowski, supra,* in this regard in that the Court does not find bad faith on the part of the defendants which might constitute a ground for said equitable relief from State court criminal proceedings. On the contra, while disagreeing with the defendants' contentions, the Court has no reason to believe that they acted in anything but good faith, and plaintiffs' prayer for an injunction enjoining the defendants from the pending criminal prosecution will be denied.

The defendant, Wilkinson, having announced his intention to apply to the Fourth Circuit Court of Appeals for immediate relief from this Court's order, said order will

contain a provision that same be stayed for a period of ten days in order to afford the defendants the opportunity requested.

An order in conformance with this memorandum will be entered.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Decided May 6, 1969

BUTZNER, Circuit Judge:

In October 1968 the defendants, the Commonwealth's Attorney and the Chief of Police for the City of Richmond, seized the film, "Angelique in Black Leather," at the Lee Art Theater, which is operated by the plaintiffs.[1] They had a search warrant secured upon affidavits of four police officers and two lawyers, who, along with the magistrate who issued the warrant, had all viewed the film. Subsequently, the theater was charged with possessing and exhibiting an obscene movie.[2] The theater in turn brought

[1] Tyrone, Inc is the lessee of the theatre. Howard William Burtnett is its manager. For convenience the plaintiffs will be referred to as the theatre. Generally the defendants will be referred to as the Commonwealth's Attorney. The police also seized previews or fliers of another film.

[2] The prosecution was initiated under Virginia's obscenity statutes. Va. Code Ann. § 18.1-227 to -236.4 (1960). Three times previously Lee Art films have been seized and convictions obtained. The first conviction, based on a seizure in March 1966, was overturned by the United States Supreme Court in Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636 (1968). Another conviction, based on an August 1966 seizure, was not appealed. And a third, which followed a seizure in October 1966, is on a writ of error to the Supreme Court of Appeals of Virginia. In October 1966 the police also seized, but later returned, Lee Art's projection equipment.

this action under 42 U.S.C. § 1983, alleging violation of its First, Fourth, and Fourteenth Amendment rights. The sole claim is that the Constitution required an adversary hearing to determine obscenity before the film could be seized. The thrust of the complaint is that the seizure and the threat of its repetition will result in the suppression of nonobscene material. Not at issue, therefore, are the constitutionality of Virginia's obscenity statutes or the obscenity of "Angelique."

The district court granted an injunction which required the Commonwealth's Attorney to return the film and prohibited the seizure of any other until its obscenity had been determined in an adversary hearing. The court refused, however, to enjoin the prosecution of the theatre in state court. On appeal, the Commonwealth's Attorney attacks the injunction, and the theatre seeks to expand it to include a ban on the prosecution. We enforce the injunction as written, except that we will require the theatre to make available a copy of "Angelique" for the preparation and trial of the criminal cases. *Metzger* v. *Pearcy*, 393 F.2d 202, 204 (7th Cir. 1968).

I.

In *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964), the Court reversed an order for the destruction of books which had been seized on a search warrant issued by a judge who had made only an *ex parte* determination of obscenity. The books had been impounded and later condemned as obscene after an adversary hearing. In reversing, four Justices of the Supreme Court found the seizure constitutionally insufficient because there had been no adversary hearing on the issue of obscenity before the books were con-

fiscated.[3] This decision, we believe, is applicable to motion pictures. The First and Fourteenth Amendments protect the expression of ideas through movies, *Burstyn* v. *Wilson,* 343 U.S. 495 (1952), and the reasons for an adversary hearing before seizure apply as strongly to them as they do to books. The hearing, of cours, is not designed to facilitate the display of obscene material, for public obscenity is not constitutionally protected. *Roth* v. *United States* 354 U.S. 476, 485 (1957); see *Stanley* v. *Georgia,* 37 U.S.L.W. 4315, 4318 (U.S. April 7, 1969) (dictum). On the contrary, as the opinion of the Court in *A Quantity of Books* makes clear, the purpose of the hearing is to safeguard against governmental suppression of nonobscene expression. With movies, as with books, "the separation of legitimate from illegitimate speech calls for sensitive tools. . . ." *A Quantity of Books* v. *Kansas,* 378 U.S. 205, 212 (1964), quoting *Speiser* v. *Randall,* 317 U.S. 513, 525 (1958).

We find support in *Metzger* v. *Pearcy,* 393 F.2d 202 (7th Cir. 1968), where the Seventh Circuit required a prior adversary hearing in a situation identical to ours in every significant way. The police lacked a search warrant there, but that provides no basis for distinguishing the case because the court focused on the lack of the hearing. *Metzger* included a requirement, which we find reasonable and also adopt, that the theatre deliver to the Commonwealth's Attorney, upon request, a copy of the movie for reasonable

[3] Mr. Justice Brennan wrote the opinion of the Court in which the Chief Justice, Mr. Justice White, and Mr. Justice Goldberg joined. Mr. Justice Black and Mr. Justice Douglas concurred because, on the basis of views they had previously expressed, the Kansas statute authorizing the destruction of the books violated the First and Fourteenth Amendments. Mr. Justice Stewart concurred on the ground that the books were not hard-core pornography. Mr. Justice Harlan and Mr. Justice Clark dissented because in their view Kansas could find the books obscene and seize them without an adversary hearing.

use in the preparation and trial of the charges now pending in the state court.[4]

In holding that the Constitution requires an adversary hearing to determine obscenity before seizure of a movie, we do not imply that the hearing must be a fully matured action at law. Matters of comparable importance are often determined on an application for a preliminary injunction, after notice to the adverse party and an opportunity for him to be heard. Cf. *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436 (1957). An order to show cause why the film should not be seized as obscene presents another possibility. Va. Code Ann. § 18.1-236.3 (1960), *as amended* (Supp. 1968). But in whatever form, the proceedings must be "designed to focus searchingly on the question of obscenity." *Marcus* v. *Search Warrant*, 367 U.S. 717, 732 (1961).

II.

In assigning cross-error to the district judge's refusal to enjoin the state court prosecutions, the theatre urges that 28 U.S.C. § 2283 is not applicable.[5] This statute generally prohibits a federal court from staying proceedings in a state court. Nevertheless, the theatre argues, 42 U.S.C. § 1983[6] creates a statutory exception to § 2283 for the en-

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[4] We express, however, no opinion on the film's admissibility in evidence.

[5] 28 U.S.C. § 2283 provides:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

[6] 42 U.S.C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

forcement of First Amendment rights. We need not pursue this approach to the problem, for it is clear that the application for the injunction lacks equity.[7] Comity dictates denial of federal injunctive relief against state prosecutions that challenge First Amendment rights when it does not appear that the accused have "been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith, or that a federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford [the accused] any protection which they could not secure by prompt trial and appeal pursued to this Court." *Douglas* v. *City of Jeannette,* 319 U.S. 157, 164 1943); cf. *Broyhill* v. *Morris,* ..... F.2d ..... (4th Cir. 1969). On the other hand, suppression of First Amendment rights of bad faith enforcement of a statute unconstitutional on its face or as applied justifies immediate prohibition. Then the chilling effect on the full exercise of First Amendment freedoms results from the prosecution itself. Abatement need not await vindication in the criminal court. *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965); cf. *Zwickler* v. *Koota,* 389 U.S. 241 (1967). But here the theatre does not challenge either the constitutionality or the application of Virginia statutes forbidding the exhibition of obscene movies. Additionally, the Commonwealth's Attorney, the district judge found, acted in good

[7] The Supreme Court has expressly left open the question whether suits under 42 U.S.C. § 1983 constitute an exception to 28 U.S.C. § 2283. Cameron v. Johnson, 390 U.S. 611, 613, n. 3 (1968); Dombrowski v. Pfister, 380 U.S. 479, 484, n. 2 (1965). We have held that they do not. Baines v. City of Danville, 337 F.2d 579 (4th Cir. 1964), *cert. denied,* 381 U.S. 939 (1965). Accord, Goss v. Illinois, 312 F.2d 257 (7th Cir. 1963); Sexton v. Barry, 233 F.2d 220 (6th Cir. 1956). Contra, Cooper v. Hutchinson, 184 F.2d 119 (3d Cir. 1950); Landry v. Daley, 288 F.Supp. 200 (N.D. Ill. 1968). See also, ALI Study of the Division of Jurisdiction between State and Federal Courts § 1372(7) (Tent. Draft No. 6, 1968).

faith when he decided that under state and federal law the film could be seized for evidentiary purposes without a prior adversary hearing.

The theatre's attack upon this finding of good faith fails to establish that it is clearly erroneous. It has not been shown that the prosecutor sought to use the seizure as a covert device for suppression of the film by delaying trial. Nor has the earlier seizure of the projection equipment been repeated. More importantly, the Commonwealth's Attorney applied for a search warrant only after the magistrate had viewed the film. And he justifies this procedure by citing *Lee Art Theatre, Inc.* v. *Virginia*, 392 U.S. 636 (1968), in which the same parties were involved. There the Court, in voiding a search warrant issued upon a single policeman's conclusion of obscenity, observed that it was unnecessary to decide "whether the justice of the peace should have viewed the motion picture before issuing the warrant." The Commonwealth's Attorney's interpretation of this remark cannot be equated with bad faith.

In sum, we have here good faith enforcement of an obscenity statute and no constitutional challenge to that statute. The district judge properly refused to enjoin the state court prosecutions. *Cameron* v. *Johnson*, 390 U.S. 611 (1968).

III.

The Commonwealth's Attorney argues that under 28 U.S.C. § 2281 this case should have been heard by a three-judge district court.[8] The film was seized in accordance with Virginia statutes setting out procedures for the search

[8] Title 28 U.S.C. § 2281 provides:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an

and seizure of contraband, including obscene material. Va. Code Ann. § 19.1-83 to -87 (1960), *as amended,* (Supp. 1968). An attack on the constitutionality of the seizure must therefore, he urges, be an attack on the constitutionality of Virginia's search and seizure statutes. This is true, he says, even though the theatre in its complaint, and consistently thereafter, has carefully limited its attack to the specific seizure, without charging that any Virginia statute is unconstitutional.

We conclude, however, that a three-judge court was not required. The theatre does not contest the authority of the Commonwealth's Attorney to seize obscene films. It simply asserts that first there must be an adversary hearing to determine obscenity. Virginia's search and seizure statutes require the judge or justice issuing the warrant to be satisfied that there is reasonable cause for the search. Generally, reasonable cause can be established from an affidavit, but the judge need not accept the affidavit alone, and nothing in the statutes prohibits him from conducting an adversary hearing, as the Constitution requires.[9] When as here, statutes would be constitutionally applied if administered properly, a single judge has jurisdiction. Cf. *Chester* v. *Kinnamon,* 276 F.Supp. 717 (D.Md. 1967).

In *Phillips* v. *United States,* 312 U.S. 246, 251 (1941), Mr. Justice Frankfurter, holding a three-judge court unnecessary in an analogous situation wrote:—

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administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

[9] Virginia also has established procedures—not used here—to provide an adversary hearing before seizure of motion picture films. Va. Code Ann. § 18.1-236.3 (1960), *as amended,* Va. Code Ann. § 18.1-236.4 (Supp. 1968).

"The crux of the business is procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy. This was the aim of Congress and this is the reconciling principle of the cases.

* * *

"Some constitutional or statuory provision is the ultimate source of all actions by state officials. But an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification. At least not within the congressional scheme of [28 U.S.C. § 2281]. It is significant that the United States in its complaint did not charge the enabling acts of Oklahoma with unconstitutionality, but assailed merely the Governor's action as exceeding the bounds of law. In other words, it seeks a restraint not of a statute but of an executive action. But the enforcement of a 'statute,' within the meaning of [28 U.S.C.§ 2281], is not sought to be enjoined merely because a state official seeks shelter under it by way of defense against a charge of lawlessness."

No. 13,192 is remanded to permit the district court to amend its injunction to make the film reasonably available to the Commonwealth's Attorney. In all other respects, the judgment is affirmed.

No. 13,193 is affirmed.